BY CHARLES E. RUMBAUGH

# Having Trouble Getting to the Negotiation Table? Try Baseball Arbitration

## (Part One of a Two-Part Series)

A fundamental question arises in some negotiations on how either party, or a mediator, can "make" all the parties participate in good faith in a negotiation/mediation process? Or, how can the parties be "persuaded" to make offers and counteroffers, as they attempt to resolve a dispute or any open items that sometimes arise in contract-related matters? These can be big and difficult questions. In this first of a two-part series, we'll take a brief look at this topic from a particular angle and subsequently offer some "applications."

### The Process

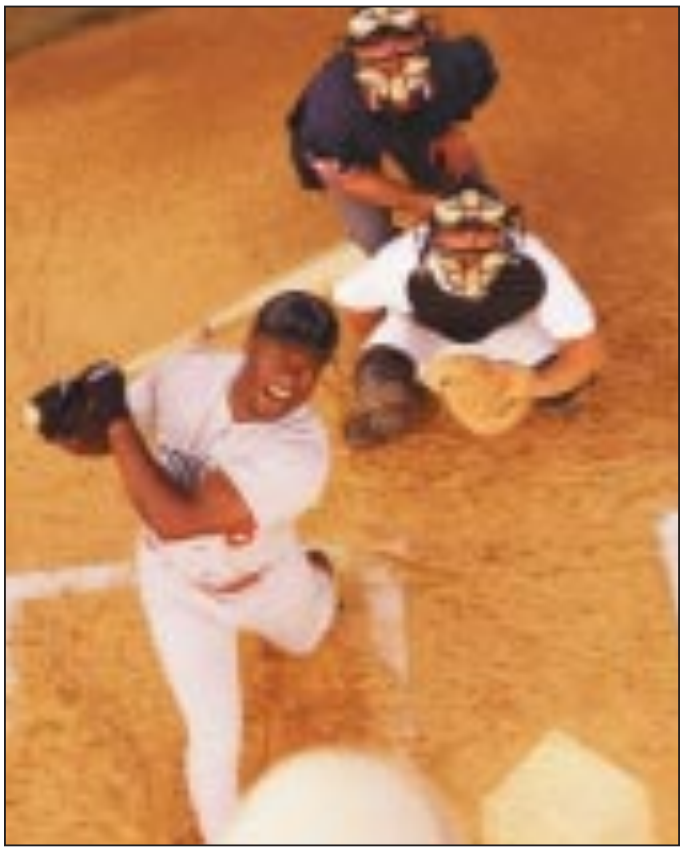
Several scenarios come to mind. First, there is the modern day version of the "Golden Rule," i.e., one of the "significant" rules in negotiations: "The one with the gold makes the rules." Another is the so-called "customers-rule-the-day," through a philosophy where one of the parties states the following: "We are a customer-oriented organization and always strive to satisfy our customers." The latter scenario is sometimes viewed as being apropos in many situations, since there are not too many organizations with too many customers!

Then, there is the approach of having a pattern of acquiescence to the other's offer. All of these approaches are usually deemed "minor," however, in relative importance to the acquiescing party. At the extreme, why do some litigants fail to resolve a dispute until just before trial? Is it due to the mere absence of bona fide offers by one or both to settle the matter? On and on—most of us have "been there and seen that."

### Details

Let's focus a bit more here. What about the situation where one of the parties would sincerely like to participate in the "negotiation dance," with offers being exchanged, but the other party does not perceive a "benefit," and therefore decides to forego the "dance?" For example, how does one address—during some negotiations or some mediation intake sessions—the perennial unequal bargaining power situation that may confront one of the parties?

Some may be of the belief that parties must have an incentive—real or perceived—to commence the negotiation or mediation process. This thought emanates from the



notion that negotiation/mediation is a voluntary process, whereby the parties always remain in control of the outcome. But how can the negotiating atmosphere, or alternative dispute resolution (ADR) process, such as mediation, be designed, structured, or enhanced to provide an incentive for the parties to move toward voluntary closure?

If one views this topic from what may be at the "end or conclusion," what do the parties see? Litigation, arbitration, or some other form of binding ADR may be the only option in the absence of voluntary resolution. Even with confidentiality in an unsuccessful mediation session, the parties look forward to unnecessary expense, time, and ultimately litigation, since there is nothing firm as to the potential outcome. Some ADR system designs may have numerous non-binding steps in the process, encouraging parties to voluntarily resolve a contractual (or other) matter.

Sometimes, however, these steps do not work. Even if the parties settle on the eve of trial/arbitration there may have been tremendous expenses incurred in preparation for that trial/arbitration. And, if it evolves into full-blown litigation, someone loses with an adverse judgment, and the parties lose as to the costs involve—including the demise of that usually all-important relationship. Most sense, or think, that an open-ended process involving a judge/arbitrator or potential runaway jury is unpredictable and thus an unacceptable process in most circumstances. Where there is a special relationship (e.g., customers and suppliers), the parties may want to explore an old remedy for this old problem.

When viewed from the end vantage point, the first of two necessary steps is that both parties must know that the "final" resolution could be within a range of possibilities or know that the ultimate resolution will only be one possibility or another, i.e., an "either/or" resolution. This first step may assist in getting the parties to the dance, but will they dance? In more cases than not, they do actively participate!

This is where the second step "kicks-in:" It is the realization by each negotiating/mediating party that the other's "offer" may ultimately be determined to be their best alternative to a negotiated agreement (BATNA). Accordingly, each party is confronted with the question, "is it in my best interests to have the other party's offer be my BATNA?" Normally, both parties cannot accept the other's alternative/offer as being their BATNA and, thus, the reason to negotiate, and get a better deal than what the other initially offers. Therefore "anything" is acceptable that is not as onerous as the other's initial offer(s), and consequently, each party is incentivized to make offers/counteroffers.

## Enter: Baseball Arbitration

Specifically, this "process" is standardized through a modified form of "baseball arbitration," whereby the parties elect in the negotiation process to utilize this form of ADR for dispute resolution, if they come to an impasse. Briefly, "baseball arbitration" usually involves one arbitrator being empowered to resolve the dispute but within a set of parameters that the parties have stipulated to in their ADR agreement/clause. This has been used for several years in the sport of baseball as a methodology to arrive at owner/player salaries—it has resulted in fewer and fewer arbitrations, since the parties "do the negotiating dance." And, again, the owner/ballplayers "dance" because the other party's offer is unacceptable as their BATNA.

The parties know what the end is notwithstanding the form of baseball arbitration that is designed/selected. One form of baseball arbitration is where the arbitrator can make an award by selecting only the final offer from either party—no "splitting the baby," so to speak. Another hybrid (usually referred to as "nighttime baseball") is where the arbitrator will not know how the parties have finally decided to structure the resolution of the dispute. Rather, the arbitrator's post-hearing decision that is closest to the undisclosed (to the arbitrator) party's last offer will win the award of the arbitration.

Facing this type of arbitration creates the atmosphere or requisite "incentive" for the parties to participate in the dance. They now know with absolute certainty what the alternative is if they do not resolve the matter. If the other party's alternative, or offer, is unacceptable as your BATNA, it requires you to respond with a more reasonable counteroffer. Otherwise, you risk having that unacceptable offer being the final resolution of the dispute. The dynamics of this realization drives the parties to a voluntary resolution. Hence, the parties make offers in good faith—since they are encouraged by knowing the end process—to negotiate or mediate their differences.

A byproduct of this process is the necessity that information be shared—fact-finding is encouraged. And, again, the offers are reasonable and realistic. If a party does not openly exchange information and actively "dance," they may have an extreme difficulty later in attempting to justify the reasonableness of their final position if the matter does not settle and is submitted to the arbitrator. With baseball arbitration the parties are disincentivized to defer to someone else to decide their dispute and incentivized to negotiate or mediate.

When some other form of binding ADR is selected, or there is no ADR agreement and the parties by necessity look to litigation, the ultimate decision-maker of the dispute (e.g. the arbitrator or judge in those situations), may be able to pick any justified resolution as the award. You may find, as others, that there is little incentive for the parties to make offers and counteroffers in these situations. However, baseball arbitration fills the void. Having an "end-in-sight" may help—either as a party or as a mediator.

## Hitting the Homerun

Are you looking for a method to greatly ensure the parties participate in good faith, by making reasonable offers and counteroffers? Look to baseball arbitration as a possible answer—you may hit a winner! In the next part of this series, I will suggest areas to apply this "incentivizing" tool. *CM*

*This is adapted from an "ADR Tip" column by Charles Rumbaugh, Esq., and Michael Powell published in the July-September 2000 issue of the* Dispute Resolution Times *by the American Arbitration Association.*

**About the Author**

**CHARLES E. RUMBAUGH is a full-time ADR Neutral with offices in Los Angeles and San Francisco, California, and serves as the co-chair of NCMA's ADR Community of Interest. You may contact Charles Rumbaugh at ADROffice@ieee.org, and send comments on this article to cm@ncmahq.org.**